IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AL-HALMANDY, *et al.*,	)	
	)	
Petitioners,	)	
	)	Civil Action No. 05-2385 (ESH)
	)	(Jawad, ISN 900)
v.	)	
	)	
BARACK OBAMA, *et al.*,	)	
	)	
Respondents.	)	
	)	

PETITIONER MOHAMMED JAWAD'S MOTION TO SUPPRESS HIS OUT-OF-COURT STATEMENTS

Pursuant to the Court's Order of June 19, 2009 (dkt. no. 279), Petitioner Mohammed Jawad hereby moves to suppress all of his out-of-court statements to Afghan and U.S. officials.[1]

Since his arrest on December 17, 2002, Mr. Jawad has been subjected to repeated torture and other mistreatment and to a systematic and sustained program of highly coercive interrogation. The statements wrung from Mr. Jawad in Afghanistan and at Guantánamo during more than fifty interrogations—even if accurately reported in the Government's unsworn hearsay summaries and interrogation reports—do not remotely meet the standard for admissibility in a federal habeas proceeding. In fact, the judge in Mr. Jawad's prior military commission previously suppressed statements purportedly made by Mr. Jawad to Afghan and U.S. officials following his arrest, finding that they were the product of torture. That Mr. Jawad was a juvenile—as young as twelve at the time according to the Afghan government—makes the coercive nature of his interrogations all the more patent and the Government's continued reliance on his statements all the more baseless.

[1] Petitioner has also filed an unredacted, classified version of this Motion through the Court Security Officer.

For the reasons set forth below, all out-of-court statements of Mr. Jawad to Afghan and U.S. officials should be suppressed because they are the product of torture or other coercion and because they do not meet the standard of voluntariness required in a federal habeas proceeding. Having aggressively litigated the admissibility of Mr. Jawad's post-arrest statements to Afghan and U.S. authorities before the military commissions and lost, the Government is collaterally estopped from seeking to admit those statements here. But even if the Government were not collaterally estopped, the Court should reach the same result independently on the facts and law presented and suppress the statements as the product of torture and other coercion, including physical abuse, sleep deprivation, stress positions, emotional and psychological manipulation, prolonged isolation, and threats.

Further, but importantly, given the Government's track record of delay in this case and in the Guantánamo detainee litigation generally, and the likelihood of an appeal by the Government of any adverse ruling, Petitioner respectfully requests that if the Court rules against the Government on collateral estoppel, the Court, if it also believes it would reach the same conclusion independently and suppress the statements, indicate as much in its ruling and make the necessary findings of fact and law to support that conclusion.

BACKGROUND AND MATERIAL FACTS

Petitioner Mohammed Jawad

Mohammed Jawad was born in an Afghan refugee camp in Miran Shah, Pakistan. Amended Petition for Writ of Habeas Corpus on Behalf of Mohammed Jawad (Also Known As Saki Bacha) ("Amended Habeas Pet'n") ¶ 15 As is common in Afghanistan, birth records and age are not accessible to most Afghans. Decl. of Eric S. Montalvo ("Montalvo Decl.") ¶ 10, Exhibit C to Pet'r's Initial Traverse ("Initial Traverse"). However, according to the Afghan

government, Mr. Jawad was twelve years old at the time of his arrest on December 17, 2002. Letter from Afghan Attorney Gen. to the United States (May 31, 2009), Exhibit A to Initial Traverse. *See also* Montalvo Decl. ¶ 10 (explaining that Mr. Jawad's father was killed during a battle against Soviet forces in 1990-1991, while Mr. Jawad's mother was pregnant with Mr. Jawad).[2] Mr. Jawad continued to live in the refugee camp with his mother, along with his uncle and cousins. Amended Habeas Pet'n ¶ 16. According to Mr. Jawad's family, he never attended school. Montalvo Decl. ¶ 11. Mr. Jawad does not speak any other language besides his native tongue, Pashto (except for a few English words learned since he has been at Guantánamo), and even in his native tongue, Mr. Jawad is functionally illiterate. Amended Habeas Pet'n ¶ 16.

On or around December 2002, Mr. Jawad traveled to Afghanistan, lured by the promise of a high-paying job removing landmines. *Id.* ¶ 18; Decl. of Lt. Col. Darrel J. Vandeveld ("Vandeveld Decl.") ¶ 4, Exhibit B to Amended Habeas Pet'n.

Interrogation by Afghan Officials

At approximately 3:30 in the afternoon on December 17, 2002, Mr. Jawad was arrested in Kabul by Afghan police in connection with a hand grenade attack on an American military vehicle that injured two U.S. Special Forces soldiers and their Afghan interpreter. Amended Habeas Pet'n ¶ 19; Decl. of Katharine Doxakis ("Doxakis Decl.") ¶ 6, Exhibit B to Initial

[2] The letter from the Afghan Attorney General post-dates the filing of the Amended Habeas Petition, and the more recent information it contains regarding Mr. Jawad's age was not available to Mr. Jawad's counsel when the Amended Habeas Petition was filed in January 2009.

In the nude photographs taken of Mr. Jawad by the United States following his arrest (*see infra*), Mr. Jawad appears to be an adolescent boy, in his early teens, between 13 and 16 years old. Decl. of Katharine Doxakis ¶ 10, Exhibit B to Pet'r's Initial Traverse. *See also* Vandeveld Decl. ¶ 14 (belief of former lead military commission prosecutor that Mr. Jawad was a minor at the time he was captured, probably 15 or 16 years of age). When Mr. Jawad arrived at Guantánamo in February 2003, less than two months after his arrest, he weighed just 119 pounds and was 5'4" in height. Exhibit M to Pet'r's Initial Traverse. Today, Mr. Jawad stands 5'9" and weighs 160 pounds. Doxakis Decl. ¶ 22.

Traverse. At least two other suspects, both adults, were arrested by the Afghan police in connection with the attack and confessed to a role in the attack. Amended Habeas Pet'n ¶ 20; Vandeveld Decl. ¶ 21; Initial Traverse at 12; *Afghan Report*, Dec. 20, 2002 & Jan. 2, 2003, Radio Free Europe/Radio Liberty, Exhibit D to Initial Traverse. But only Mr. Jawad was turned over by Afghan authorities to U.S. custody. No formal police investigation of the attack was conducted by Afghan police and no civilian eyewitnesses were identified or questioned. Amended Habeas Pet'n ¶ 20.[3]

Following his arrest, Mr. Jawad was taken to an Afghan police station where he was subjected to the first of many instances of physical and psychological abuse. For the next several hours, Afghan police and numerous high level Afghan officials, including the Interior Minister, interrogated a terrified and disoriented Mr. Jawad. Amended Habeas Pet'n ¶¶ 21-22; Decl. of Mohammed Jawad ("Jawad Decl."), *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba) (Sept. 26, 2008), Exhibit L to Initial Traverse. During this interrogation police threatened to kill Mr. Jawad and his family if he did not confess to the crime. Doxakis Decl. ¶ 6. Mr. Jawad was also subjected to physical abuse, including being struck by Afghan police on the bridge of his nose with the butt of a gun. *Id.* ¶ 10; Amended Habeas Pet'n ¶ 24; Jawad Decl. at 1.

A written confession was prepared by one of the policeman. The confession was in Farsi, a language Mr. Jawad could not speak, much less read or write. Doxakis Decl. ¶ 6; Vandeveld Decl. ¶¶ 5, 21. (In fact, as noted above, Mr. Jawad was functionally illiterate even in his native language of Pashto). The policeman then told Mr. Jawad that he needed to affix his thumbprint

[3] At the time of the attack, Kabul, Afghanistan, was not an active battle zone. In fact, there had been no attacks against U.S. forces in Kabul since the fall of Kabul to the Northern Alliance several months earlier. Doxakis Decl. ¶ 8.

to a piece of paper in order to be released. Doxakis Decl. ¶ 6; Vandeveld Decl. ¶ 21. Mr. Jawad did so. Doxakis Decl. ¶ 6. The piece of paper with Mr. Jawad's thumbprint on it was attached to the written confession and later handed to the United States with the explanation that it was the signed written confession of Mr. Jawad. Doxakis Decl. ¶ 6; Vandeveld Decl. ¶ 21. The U.S. government apparently accepted the document at face value, even though it was full of demonstrably false information and was entirely inconsistent with the other "confession" Mr. Jawad purportedly made later that evening. Doxakis Decl. ¶ 6; Vandeveld Decl ¶ 21. During a suppression hearing in Mr. Jawad's military commission prosecution at Guantánamo, the Government renounced its intention to rely on this document, stating that it no longer considered the document to be a statement of Mr. Jawad and that it would not be offering it into evidence at all. Doxakis Decl. ¶ 6; Excerpt from Transcript of Suppression Hearing at 751, *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba, filed Sept. 26, 2008), Exhibit I to Initial Traverse.[4] Yet, inexplicably, the Government seeks to rely on that same document here.

No Afghan officials made any effort to contact Mr. Jawad's parents or any social service agency in the Afghan government responsible for the well-being of juveniles, despite clearly identifying him as a juvenile. Amended Habeas Pet'n ¶ 23. There also is no indication that Mr. Jawad was given any form of rights advisement, such as the right to remain silent, or an explanation of the potential legal consequences of confession by Afghan authorities. Nor did the interrogators provide Mr. Jawad with anything to eat or drink during the entire time he was in their custody. *Id.* Moreover, Afghan officials present at Mr. Jawad's interrogation observed him to be under the influence of, or suffering withdrawal from, unidentified drugs. *Id.* ¶ 21. Yet, not only did the Afghan officials fail to contact Mr. Jawad's mother or any other adult responsible

[4] The Government continued to rely on Mr. Jawad's purported oral statements to Afghan officials, which were the subject of the military judge's suppression ruling. *See infra.*

for Mr. Jawad's well-being or interests, but they did not even wait for the effects of the drugs to wear off before commencing their lengthy interrogation. *Id*.

Based on the threat to Mr. Jawad's life and the threat to kill members of his family, the judge in Mr. Jawad's military commission prosecution, Colonel Stephen R. Henley, suppressed all statements, written or oral, made by Mr. Jawad to Afghan authorities on December 17, 2002. D-022 Ruling on Defense Motion to Suppress Out-Of-Court Statements of the Accused to Afghan Authorities, *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba, filed Oct. 28, 2008), Exhibit E to Initial Traverse. Judge Henley specifically found those threats credible:

> In this case, the Afghan government and police authorities told the Accused he and his family would be killed if he did not confess to throwing the grenade. The interrogators were armed. There is no evidence the threats were made in jest or intended as a joke. Given the Accused's age and the then reputation of the Afghan police as corrupt and violent, the Commission specifically finds these threats credible.

Id. at 2. As the product of torture, Judge Henley ruled that the statements must be excluded. *Id.* at 4. The government did not appeal this ruling. Amended Habeas Pet'n ¶ 62.

Post-Arrest U.S. Interrogation

At approximately 10 p.m. the night of his arrest, after several continuous hours of interrogation by Afghan officials, Mr. Jawad was handed over to U.S. Special Forces. Doxakis Decl. ¶ 9; Vandeveld Decl. ¶ 6; Amended Habeas Pet'n ¶ 26. Mr. Jawad was handcuffed, blindfolded, hooded, and placed in a car, then driven to the U.S. Forward Operating Base on the outskirts of town. Doxakis Decl. ¶ 9. Upon arrival, Mr. Jawad was given a medical screening,

and then forced to pose for a series of humiliating and degrading nude photographs. *Id.*; Amended Habeas Pet'n ¶ 31.[5]

After the nude photography session, Mr. Jawad was re-blindfolded and re-handcuffed, and taken to a makeshift interrogation room where he endured another multiple-hour session at the hands of two military interrogators. Doxakis Decl. ¶ 11. Falsely informed by Afghan authorities that Mr. Jawad was fluent in English, the interrogators began by screaming at Mr. Jawad in English while he cowered in fear on the floor, where the interrogators had placed him to reinforce the shock and hopelessness of captivity. Doxakis Decl. ¶ 11. When the interrogators finally realized Mr. Jawad did not speak English and started speaking to him in Pashto, Mr. Jawad told them that he did not throw the grenade. *Id.* The U.S. interrogators, believing Mr. Jawad to be responsible for the attack based on information provided by the Afghan government, did not accept his denials and pressed him for several hours, using a variety of battlefield techniques. These include [redacted]. Interrogators also told Mr. Jawad, who was blindfolded and hooded at the time, to hold onto a water bottle that he believed was a bomb and could explode at any moment. Amended Habeas Pet'n ¶ 31. [redacted]

[5] These photographs are classified but were given to the defense in discovery during the military commission prosecution. Doxakis Decl. ¶ 9.

[redacted] Mr. Jawad was completely terrified throughout the interrogation, and feared that the Americans, who were very large and muscular, were going to kill him. Doxakis Decl. ¶ 11. [redacted]

Once again, Mr. Jawad was not provided legal counsel (Afghan or American) or afforded any other representative or assistance despite his age. According to the interrogators, the entire interrogation was videotaped for the purpose of preserving the evidence. *Id.*; Vandeveld Decl. ¶ 6. But despite repeated requests by Mr. Jawad's military defense counsel—and repeated orders from Judge Henley—the Government failed to turn over the video, claiming that it was lost. Doxakis Decl. ¶ 12; *see also* Vandeveld Decl. ¶ 20.

Ultimately, in the early hours of the morning of December 18, according to the interrogators, Mr. Jawad confessed to throwing the hand-grenade. Doxakis Decl. ¶ 12. Judge Henley, however, suppressed the confession, finding that it was tainted by Mr. Jawad's earlier confession to the Afghan police, which had been obtained under threats of death to Mr. Jawad and his family. D-021 Ruling on Defense Motion to Suppress Out-Of-Court Statements By the Accused While in U.S. Custody, *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba, filed Nov. 19, 2008), Exhibit F to Initial Traverse. The government did appeal this ruling to the Court of Military Commission Review, but has twice sought a 120-day stay of its appeal, specifically citing this habeas action as a basis for why Mr. Jawad would not be prejudiced and why a stay was in the interests of justice. Pet'r's Opp'n to Resp'ts' Mot. for an Extension of

Time to Comply with the Court's Apr. 27, 2009 Order at 2-3, *Al Halmandy v. Obama*, No. 05-2385 (D.D.C. June 1, 2009) (dkt. no. 258).

After a short break around 4 a.m., when Mr. Jawad was allowed to sleep on the floor, the United States transported Mr. Jawad to the Bagram Theater Internment Facility ("Bagram") on the morning of December 18, 2002. Doxakis Decl. ¶ 14.

Brutal Treatment at Bagram

The treatment of detainees at Bagram in the fall of 2002 and winter of 2003 is widely considered to be among the worst of any Defense Department detention facility in the entire "war on terror." Doxakis Decl. ¶ 15. At the time, the prison was run by the notorious 377th Military Police Company from Indiana and the 519th Military Intelligence Battalion, a hastily assembled unit of poorly trained and untrained interrogators. *Id.* Members of these units routinely beat prisoners and employed other illegal and sadistic interrogation practices. *Id.*; Douglas Jehl, *Army Details Scale of Abuse of Prisoners in Afghan Jail*, N.Y. Times, Mar. 12, 2005, Exhibit G to Initial Traverse; Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. Times, May 20, 2005, Exhibit G to Initial Traverse. In fact, just days before Mr. Jawad arrived at Bagram, on December 4 and 10, 2002, two detainees were beaten to death there by U.S. forces. Doxakis Decl. ¶¶ 15-16; Amended Habeas Pet'n ¶ 34. (The Academy Award winning documentary *Taxi to the Dark Side* focuses on one of those murders and the rampant mistreatment of prisoners at Bagram). All of the prisoners at Bagram were well aware that the two detainees had been beaten to death and lived in constant fear of the guards and interrogators. Doxakis Decl. ¶ 16. The Bagram prison constantly echoed with the screams, moans, and pleas for mercy of detainees who were being beaten, chained to the wall, subjected to extreme cold temperatures, and forced to endure other harsh tactics. *Id.*; Testimony of Angela

Birt ("Birt Testimony") at 598, *United States v. Jawad*, (Military Comm'n, Guantánamo Bay, Cuba), Exhibit O to Initial Traverse.

During his approximately forty-nine days at Bagram, Mr. Jawad was interrogated at least eleven times. Doxakis Decl. ¶ 19; Amended Habeas Pet'n ¶ 36. Once again, Mr. Jawad was denied access to counsel, to family members, or to any representative or other person responsible for protecting his welfare or interests. U.S. personnel at Bagram subjected Mr. Jawad to beatings, forced him into painful "stress positions," deprived him of sleep, forcibly hooded him, placed him in physical and linguistic isolation, pushed him down stairs, chained him to a wall for prolonged periods, and subjected him to threats, including threats to kill him, and other intimidation. Amended Habeas Pet'n ¶ 35; Vandeveld Decl. ¶ 25; CID Agent's Investigation Report (June 28, 2004) ("CID Investigation Report"), Exhibit H to Initial Traverse; Birt Testimony at 595-99, 605.

While in an isolation cell, Mr. Jawad remained hooded and restrained with handcuffs. CID Investigation Report. Guards made him stand up and, if Mr. Jawad sat down, he was beaten. *Id.* Guards also kicked Mr. Jawad and made him fall over, as he was wearing leg shackles and was unable to take large steps. *Id.* Sometimes guards fastened Mr. Jawad's handcuffs to the door of his isolation cell so that he was unable to sit down. *Id.* At one point Mr. Jawad became so sick from his treatment in the isolation cell at Bagram that he was taken to the hospital and was treated for pain in his chest and problems with urination. *Id.*

Typically, beatings by guards preceded interrogation sessions. *Id.*; *see also* Birt Testimony at 605 (explaining how military police acted as agents of military interrogators by "keeping up the course of sleep deprivation"). Interrogators often placed Mr. Jawad in a position along the wall where he was sitting without a chair and with his arms

outstretched. CID Investigation Report. Interrogators also intentionally deceived Mr. Jawad, falsely informing him that victims of the grenade attack were near death and probably were not going to make it, when in fact they were not in critical condition. Doxakis Decl. ¶ 19. They told Mr. Jawad that he would probably never see his family again and could spend the rest of his life in U.S. custody. *Id.*; [redacted] Mr. Jawad was informed that his best chance for leniency was if he cooperated and told interrogators what they wanted to hear. Doxakis Decl. ¶ 19. Interrogators also played upon the helpless youth's fear of long-term of incarceration and longing for his mother. Amended Habeas Pet'n ¶ 37. [redacted] On at least one occasion, Mr. Jawad fell asleep during interviews because he was so tired and appeared to be suffering from drug withdrawal that caused him to fidget and lose focus. Amended Habeas Pet'n ¶ 36; [redacted] Mr. Jawad became so disorientated by his treatment at Bagram that he did not even know whether it was day or night. [redacted] Indeed, Mr. Jawad grew so desperate during the interrogations that he eventually told interrogators that he was contemplating suicide. Amended Habeas Pet'n ¶ 37.

The Army Criminal Investigation Division ("CID") subsequently conducted a comprehensive investigation into abuses at Bagram during this period, resulting in a two thousand page investigative report. Doxakis Decl. ¶ 17. As part of the investigation, Army CID agents traveled to Guantánamo in June 2004 to interview detainees who had been at Bagram during this period. One CID agent interviewed Mr. Jawad, and a summary of the interview was included in the Army's report. *Id.*; CID Investigation Report. The CID agent who interviewed Mr. Jawad, Angela Birt, noted that Mr. Jawad was much younger than any of the other detainees she interviewed. Birt Testimony at 594. Ms. Birt stated that she found Mr. Jawad's account of his mistreatment at Bagram to be highly credible and consistent with the accounts of both other detainees held there during the same period and guards, many of whom admitted to various degrees of mistreatment and abuse. *Id.* at 595-96. Ms. Birt also testified that the abuses at Bagram during the period that Mr. Jawad was there were the worst she had ever seen. *Id.* at 603.

Rendition to Guantánamo and Continued Abuse

On February 6, 2003, the United States transported Mr. Jawad to Guantánamo. Before rendering him, Mr. Jawad was intentionally starved for three days and given only sips of water—standard procedures undertaken at the time to ensure that detainees would not soil themselves during the long flight from Afghanistan, as detainees remained shackled and prohibited from using the lavatory. Doxakis Decl. ¶ 20. Mr. Jawad's flight to Guantánamo lasted approximately twenty-three hours. *Id.*

The Standard Operating Procedures (SOPs) for Guantánamo detentions at the time emphasized that the purpose of the so-called Guantánamo "Behavior Management Plan" for each newly arrived detainee was to "enhance and exploit" in the interrogation process the detainee's "disorientation and disorganization." Camp Delta Standard Operating Procedures, Headquarters,

Joint Task Force—Guantánamo § 4-20a, Mar. 28 2003, attached hereto as Exhibit P.[6] The plan concentrated on "isolating the detainee and fostering dependence of the detainee on his interrogator." *Id.* For at least the first 30 days, the detainee would have no contact with anyone except his interrogators. *Id.*; *see also* Amnesty International, *USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child 'enemy combatant'* at 17 (Aug. 13, 2008) ("Amnesty Report"), *available at* http://www.amnesty.org/en/library/asset/AMR51/091/2008/en/d47d414f-693e-11dd-8e5e-43ea85d15a69/amr510912008eng.pdf. As part of the Defense Department's attempt to re-engineer the Survival Evasion Resistance Escape ("SERE") program at Guantánamo, physical and psychological pressures around such themes as isolation, induced debilitation, threats, and degradation were all deliberately employed in combination "to elicit compliance from [human intelligence] sources by setting up the 'captive environment.'" Amnesty Report at 16 (quoting January 2003 memorandum from SERE training specialist to interrogation authorities at Guantánamo).

The SERE program's role in interrogations at Guantánamo (as well as at Bagram, at CIA "black sites," and in Iraq) is well-documented, including by a recently released Senate Armed Services Committee report. *See, e.g.*, S. Comm. of the Armed Services, Inquiry into the Treatment of Detainees in U.S. Custody, 110th Cong., 2d Sess. (Nov. 20, 2008) ("SASC Report");[7] *see also, e.g.*, Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (2008). The SERE program was originally motivated by

[6] The complete March 2003 SOP is available at http://wikileaks.org/leak/gitmo-sop.pdf. Petitioner's exhibits submitted with this motion are lettered consecutively following the last lettered exhibit submitted with his Initial Traverse, whose exhibits go from Exhibit A through Exhibit O.

[7] The Executive Summary of the SASC's 232-page report is provided for the Court's convenience. *See* SASC Report, Executive Summary, attached hereto as Exhibit Q. The full SASC Report is available at http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

the brutal interrogation methods used by the Chinese Communists against American soldiers during the Korean War to obtain false confessions, and was intended to provide training to U.S. Special Forces and other military personnel to prepare them to withstand torture and other abuse if they were captured by enemy forces that did not abide by the Geneva Conventions. SASC Report at xiii, 2-3; Mayer, *The Dark Side*, at 160. The program tried to engender acute anxiety by creating an environment of extreme uncertainty during harsh interrogations by mock interrogators. Trainees, for example, would be hooded, stripped of clothing, exposed to extreme temperature, subjected to sexual humiliation, and forced to endure other forms of "illegal exploitation." SASC Report at xiii. Their sleep patterns would also be disrupted and their religious faith desecrated. *Id*. Those who administered the SERE program were not trained interrogators, and the program was not designed to obtain reliable intelligence but rather to train American personnel to resist providing reliable information to America's enemies. *Id*. After 9/11, however, the SERE program was "re-engineered" and the harsh interrogation methods once used to train U.S. service members were used to interrogate detainees at Guantánamo and elsewhere whom the Bush administration said were not covered by the Geneva Conventions. *Id.* at xiii-xv, xix-xx; Mayer, *The Dark Side*, at 189-90 ("Hooding, stress positions, sleep deprivation, temperature extremes, and psychological ploys designed to induce humiliation and fear" became "legion" at Guantánamo with the re-engineering of SERE techniques). In December 2002, after former Defense Secretary Donald Rumsfeld had approved a memo approving harsh interrogation techniques, military trainers traveled to Guantánamo to provide instruction in the use of harsh interrogation methods and the application of SERE methods against detainees there. *Id.* at xix-xxii.

This was the environment into which Mr. Jawad was dropped, and his mistreatment continued at Guantánamo without respite. Immediately upon arrival, Mr. Jawad was placed in maximum segregation to reinforce his sense of hopelessness and to set the stage for "successful" interrogations. Doxakis Decl. ¶ 21; *see also* Amended Habeas Pet'n ¶ 40. During this 30-day period, Mr. Jawad was denied all human contact, other than with interrogators. Doxakis Decl. ¶ 21. Even chaplain and International Committee for the Red Cross visits were restricted. *Id.* No exceptions were made for Mr. Jawad despite his age, and at no time during his incarceration at Guantánamo did Mr. Jawad ever receive any rehabilitative treatment, special education, or other rights in recognition of his juvenile status. *Id.*; Amended Habeas Pet'n ¶ 41. To the contrary, Mr. Jawad has always been housed with and treated the same as adult prisoners at Guantánamo.

Mr. Jawad was interrogated almost immediately upon arrival, and was interrogated frequently throughout the spring and summer of 2003. Doxakis Decl. ¶ 23. During these interrogations, Mr. Jawad expressed homesickness and cried for his mother. *Id.* In September 2003, one interrogator became concerned about Mr. Jawad's mental health after observing him talking to a poster on the wall. *Id.* Mr. Jawad explained that the poster reminded him of home. *Id.* The interrogator asked for a Behavioral Science Consultation Team (BSCT) psychologist, [redacted], to observe Mr. Jawad. The BSCT psychological assessment that resulted, however, was not performed for the purpose of treatment, but "was instead conducted to assist the interrogators in extracting information from Mr. Jawad, even exploiting his mental vulnerabilities to do so." Vandeveld Decl. ¶ 23; *see also* SASC Report at 50-57 (describing BSCT's role in interrogations at Guantánamo and its embrace of harsh interrogation measures, including prolonged isolation, sleep deprivation, depriving detainees of food and other basic

necessities, and other forms of pressure "to enhance capture shock, dislocate expectations, foster dependence, and support exploitation to the fullest extent possible"). The BSCT assessment and recommendation for Mr. Jawad, which is classified, is "chilling." Doxakis Decl. ¶ 24. [redacted]

[redacted]

Based on the BSCT psychologist's recommendation on how best to break Mr. Jawad's will and devastate him emotionally, Mr. Jawad was then placed in isolation for an additional 30-day period, the maximum allowed under the rules then in effect. Doxakis Decl. ¶ 24; Amended Habeas Pet'n ¶ 44. Mr. Jawad was also disciplined with the removal of "comfort items" for attempting to talk to other detainees in his block. Amnesty Report at 19.

Eventually, the abuse took its toll. Doxakis Decl. ¶ 25. On December 25, 2003, Mr. Jawad tried to commit suicide in his cell. *Id.*; Amended Habeas Pet'n ¶ 46. Prison logs indicate that Mr. Jawad tried to hang himself and, unable to do so, slammed his head repeatedly against the wall. Doxakis Decl. ¶ 25.

Perhaps the worst abuse Mr. Jawad suffered was still to come: the notorious "frequent flyer" sleep deprivation program. Doxakis Decl. ¶ 26. Official prison records show that Mr. Jawad was moved 112 times from cell to cell during a 14-day period from May 7 to May 20, 2004, just months after his suicide attempt. *Id.*; Sleep Deprivation/Frequent Flyer Program Chronology, attached hereto as Exhibit R. The express purpose of moving Mr. Jawad was to disrupt his sleep cycle, and Guantánamo officials were well aware of Mr. Jawad's extremely fragile mental health and poor physical condition at the time the program was administered. The harmful and potentially permanent physical and mental impact of far briefer periods of sleep deprivation is well-documented and widely recognized. *See, e.g.*, Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by US Forces* (2005), at 11,

available at http://physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf. Mr. Jawad's medical records indicate that he suffered significant health effects during this period, including blood in his urine, bodily pain, and a weight loss of 10% from April 2004 to May 2004. Amended Habeas Pet'n ¶ 48.

This sleep deprivation program, according to testimony by a Government official, was "standard operating procedure" and done with the full knowledge and approval of Guantánamo camp officials. Doxakis Decl. ¶ 27. The official testified that the program was part of Guantánamo's overall "incentive program" and claimed the program was "humane." *Id.* The judge presiding over Mr. Jawad's military commission trial felt differently, ruling that subjecting Mr. Jawad to the program constituted "abusive conduct and cruel and inhuman treatment." D-008 Ruling on Defense Mot. to Dismiss—Torture of the Detainee at 4-5, *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba, filed Sep. 24, 2008) ("D-008 Ruling"), attached hereto as Exhibit S. Judge Henley further concluded that this "flagrant misbehavior" had "no legitimate intelligence purpose," *id.* at 2, 5, and was "calculated to profoundly disrupt [Mr. Jawad's] mental senses." *Id.* at 2. Judge Henley also found that Mr. Jawad had been subjected to other highly coercive conditions at Guantánamo, including excessive heat, constant lighting, loud noise, linguistic isolation (separation from other Pashto speakers), and, on at least two separate occasions, 30-days physical isolation. *Id.* at 3; *see also* Doxakis Decl. ¶ 28 (noting that Mr. Jawad suffered from severe headaches that made it difficult for him to sleep).

Throughout virtually Mr. Jawad's entire time at Guantánamo, he has been incarcerated in Supermax-like conditions in a single-occupancy cell, with only a small meal tray slot in the door through which he could communicate with nearby detainees. Doxakis Decl. ¶ 28. Until improvements were instituted in January 2009, Mr. Jawad was generally permitted, at most, one

hour of exercise per day outside in a small caged pen. *Id.* Frequently, the opportunity to exercise came during the night when Mr. Jawad was trying to sleep so he declined. *Id.*

The monotony of Mr. Jawad's daily existence at Guantánamo has been broken only by additional efforts to interrogate him. From the time of Mr. Jawad's arrival in February 2003 until military commission charges were referred against him in October 2007, Mr. Jawad was interrogated well over fifty times. Interrogation Spreadsheet, Exhibit N to Initial Traverse. As the records submitted by the Government indicate, interrogators repeatedly sought to exploit Mr. Jawad's fear of long-term incarceration and love of his family, in particular of his mother. [redacted] At no time during which the interrogations were conducted was Mr. Jawad afforded access to counsel or to any other representative, notwithstanding his young age.

According to the clinical psychologist who examined Mr. Jawad over the course of a three-month period in late 2008, Mr. Jawad is suffering from Post-Traumatic Stress Disorder, a condition resulting from his repeated exposure to life-threatening and terrifying events. Decl. of Dr. Katherine Porterfield ("Porterfield Decl.") at 4, Exhibit E to Decl. of David Frakt in Supp. of Pet'r's Opp. to Resp'ts' Mot. to Dismiss the Habeas Pet. of Mohammed Jawad Without Prejudice or, Alternatively, to Hold the Pet. in Abeyance Pending Completion of Military Comm. Proceedings, *Al Halmandy v. Obama*, No. 05-2385 (D.D.C. Feb. 18, 2009) (dkt. no. 196). As Dr. Porterfield found, "the torture, cruelty, and abuse [Mr. Jawad] suffered while in detention are the likely precipitants of his current psychological difficulties." *Id.* Dr. Porterfield

further found that the symptoms Mr. Jawad currently suffers from, including flashbacks of traumatic events, frequent nightmares, and difficulty sleeping, are both highly credible and consistent with the symptoms of victims of torture and other abuse. *Id.* at 4-5.

ARGUMENT

I. The Government Is Collaterally Estopped from Relying on Petitioner's Statements To Afghan and U.S. Officials on December 17-18, 2002.

On September 18, 2008, Mr. Jawad's defense counsel in the military commission prosecution moved to suppress statements allegedly made by Mr. Jawad. The first motion was directed at statements allegedly made to Afghan authorities following Mr. Jawad's arrest on December 17, 2002; the second was directed at statements allegedly made to U.S. officials later that night and early the following morning. Upon extensive briefing and a fully litigated hearing, Judge Henley granted the suppression motions. Specifically, Judge Henley found that the statements Mr. Jawad allegedly made to Afghan authorities "were obtained by physical intimidation and threats of death, which, under the circumstances constitute torture." D-022 Ruling on Defense Motion to Suppress Out-Of-Court Statements of the Accused to Afghan Authorities at 3, *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba, Oct. 28, 2008), Exhibit E to Initial Traverse ("D-022 Ruling"). Judge Henley also found that Mr. Jawad's alleged statements to U.S. authorities later that day and night were "tainted by his earlier confession to the Afghan police, which had been achieved under threats of death to the Accused and his family" and were rendered inadmissible by the taint. D-021 Ruling on Defense Motion to Suppress Out-Of-Court Statements By the Accused While in U.S. Custody at 3-5, *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba, Nov. 19, 2008), Exhibit F to Initial Traverse ("D-021 Ruling"). The Government appealed only the D-021 suppression ruling.

Having litigated and lost these motions before the military commissions, the Government is collaterally estopped from relying on the suppressed statements in the habeas litigation before this Court. *See Weaks v. FBI-MPD Safe Sts. Task Force*, No. Civ. A. 05-0595, 2006 WL 212141 (D.D.C. Jan. 27, 2006) (a party who lost a suppression motion in a criminal proceeding cannot relitigate the issue in a civil proceeding); *United States ex rel. Di Giangiemo v. Regan*, 528 F.2d 1262, 1265-66 (2d Cir. 1975) (collateral estoppel applies to suppression hearings). Under the doctrine of collateral estoppel, "matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel." *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1947); *accord Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992). That the Government has appealed one of the rulings is does not alter the result: "The federal rule is that pendency of an appeal does not suspend the operation of a final judgment for purposes of collateral estoppel, except where appellate review constitutes a trial de novo." *Nixon v. Richey*, 513 F.2d 430, 438 n.75 (D.C. Cir. 1975) (citing, *inter alia*, *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 188-89 (1941); *Reed v. Allen*, 286 U.S. 191, 199 (1932)); *see also Deposit Bank v. City of Frankfort*, 191 U.S. 499, 510-11 (1903).[8] Appeals to the Court of Military Commission Review ("CMCR") do not qualify for this exception because that court conducts only de novo review of issues of law. *See* Military Commissions Act of

[8] A "final judgment" need not be on the merits to have preclusive effect. Rather, "final judgment includes any prior adjudication of an issue in another action between the parties that is determined to be sufficiently firm to be accorded conclusive effect." *Regan*, 528 F.2d at 1265 (internal quotation marks omitted). The indicia of finality are "that the parties were fully heard, that the court supported its decision with a reasoned opinion, [and] that the decision was subject to appeal or was in fact reviewed on appeal," *id.*, all of which exist with respect to the military commission's suppression rulings. *See also Zdanok v. Glidden Co., Durkee Famous Foods Division*, 327 F.2d 944, 955 (2d Cir. 1964) ("'Finality' in the [collateral estoppel] context . . . may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.").

2006, Pub. L. No. 109-366, § 950d(c), 120 Stat. 2600, 2621 ("MCA") (codified at 10 U.S.C.A. § 950d(c)).

The doctrine of collateral estoppel serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979). It preserves the integrity of the judicial process and "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 154 (1979). Collateral estoppel requires three elements:

> [1], the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case [; 2], the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case [; and] [3], preclusion in the second case must not work a basic unfairness to the party bound by the first determination.

Martin v. DOJ, 488 F.3d 446, 454 (D.C. Cir. 2007) (quoting *Yamaha Corp.*, 961 F.2d at 254). Each requirement is met here.

First, Petitioner's instant suppression motion is identical in material respects to the suppression motions decided by Judge Henley in the military commission prosecution. One suppression motion (the subject of the D-022 Ruling) addressed: a) whether Afghan authorities extracted Mr. Jawad's statements through torture or other coercion; and b) whether the use of torture or other coercion rendered those statements inadmissible. The second suppression motion (the subject of the D-021 Ruling) addressed: a) whether Mr. Jawad's statements to U.S. officials later that night were tainted by his mistreatment by and prior statements to Afghan

personnel; and b) whether that taint rendered those statements inadmissible. Judge Henley answered all four questions in the affirmative.[9]

Judge Henley concluded that the Afghan authorities made a "credible threat" to kill Mr. Jawad and his family if he did not confess to throwing the grenade. D-022 Ruling at 1-2. Judge Henley further found that those threats constituted torture, defined by the Military Commission Rules of Evidence ("MCRE") as "an act specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within the actors custody or physical control," including the "'[s]evere mental pain or suffering' . . . caused by or resulting from the threat of imminent death." D-022 Ruling 2 n.4 (citing MCRE § 304(3)(C)). The Government is bound here by both that factual determination and ultimate legal conclusion of inadmissibility. *See Baker v. GMC*, 522 U.S. 222, 233 (1998) (under collateral estoppel, "an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim").

Admittedly, the law governing the admissibility of coerced statements in the military commission context deviates in some respects from the law governing the admissibility of such statements in an Article III court. But none of these deviations undermines the preclusive effect of Judge Henley's suppression rulings for two reasons. First, both the military commissions and federal courts categorically bar evidence wrested through torture. *Compare* MCRE § 304(a)(1) ("a statement obtained by use of torture shall not be admitted into evidence against any party or witness"), *with Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944) ("declarations procured by torture are not premises from which a civilized forum will infer guilt"); *see also infra* Point II.B.

[9] Judge Henley thus did not need to reach the question of whether Mr. Jawad's statements to U.S. officials on December 17 and 18 were also inadmissible because they themselves were the direct result of torture or other coercion. *See* D-021 Ruling at 5.

Second, as the Government itself conceded in its appeal before the military commission, where the law deviates—*e.g.*, with respect to statements obtained through coercion falling short of torture—the threshold for exclusion in a military commission is higher than in an Article III court.[10] C*ompare* MCRE § 304(c)(1) (admitting statements obtained through methods amounting to cruel, inhuman, or degrading treatment, if the military judge finds that they are reliable and of sufficient probative value, and that their admission would serve the interests of justice),[11] *with Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (statements extracted under coercion are categorically inadmissible not only "because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law"). Given this higher threshold, a statement deemed inadmissible as the product of torture or other coercion in a military commission is, *a fortiori*, inadmissible in an Article III court.

As for the second suppression motion (statements to U.S. officials), Judge Henley adjudicated the same factual disputes with reference to the same points of authority presented to the Court for decision here. Relying on the well-established law of taint, *see, e.g.*, *Oregon v. Elstad*, 470 U.S. 298 (1985); *Clewis v. Texas*, 386 U.S. 707 (1967), Judge Henley conducted a "totality of circumstances" analysis to ascertain whether the coercion surrounding Mr. Jawad's

[10] In fact, the Government's main argument on appeal to the CMCR was that the military commission erred by applying the presumption, long-settled in federal courts, that an act of torture presumptively taints subsequent confessions. The Government details at length how the MCA deliberately exempted the commissions from traditional restrictions on the use of statements extracted through coercion and compulsory self-incrimination. *See United States v. Jawad*, Brief on Behalf of Appellant at 9-13, *available at* http://www.defenselink.mil/news/d20081223Jawadappellantbrief.pdf.

[11] This rule applies only to statements—like Mr. Jawad's—made prior to December 30, 2005. A military judge may admit statements made after that date only upon a finding that "the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment." MCRE § 304(c)(2).

first "confession" had dissipated by the time of his second. *See* D-021 Ruling at 3-5. Among the myriad of factors that Judge Henley considered in this analysis were:

> (1) the Accused's age and education; (2) that he was under the influence of drugs and deprived of sleep; (3) the repeated and prolonged nature of the questioning; (4) the temporal proximity between the arrest, the first confession and the second; (5) that the Accused remained in custody the entire time and was hooded and handcuffed while transferred to FOB [Forward Operating Base] 195 - in other words, there was no break in the stream of events from the Accused's initial apprehension and interrogation by the Afghan police to the second confession; (6) that, after arriving at FOB 195, the U.S. interrogator used techniques to maintain the shock and fearful state associated with the Accused's initial apprehension by the Afghan police, to include blindfolding and placing a hood over his head; (7) the absence of a cleansing statement; (8) that, while the actual U.S. interrogator may have been unaware of the Accused's exact statements to the Afghan police, agents of the U.S. government were aware that the Accused had confessed to throwing the grenade before arriving at FOB 195; and (9) the change in locations of the interrogations and the identities of the interrogators.

Id. at 3-4. Based on this careful examination, Judge Henley concluded that the "subsequent confession was itself the product of the preceding death threats" by Afghan authorities, and consequently inadmissible. *Id.* at 5.

As to the second condition for collateral estoppel, the military commission has "actually and necessarily" determined the issue of admissibility by hearing and issuing final rulings on the suppression motions. *See Martin*, 488 F.3d at 454

As to the third and final condition, precluding Government from relitigating the issue would not "work a basic unfairness." *Id*. Courts have identified two circumstances that would exempt a party from the collateral estoppel rule: first, where the party's incentive to litigate the issue is of "vastly greater magnitude" in a later proceeding than when initially decided, *Yamaha*, 961 F.2d at 254; and second, where the "prior proceedings were seriously defective," *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 333 (1971). Neither applies here. The first exception is based on the notion that a party should not be bound "in unforeseen ways by

half-hearted litigation of an apparently trivial claim." *See* 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4465, at 598 (1981). But the Government's vigorous litigation of the military commissions case itself underscores that the Government was fully aware of the significance of the suppression motions. There is no plausible reason why the Government, having fought tooth and nail to keep its military commission prosecution of Mr. Jawad alive, would have a "vastly greater" incentive to effectively litigate the issue on the habeas track than it had in the commissions. Further, the Government has never said that the commission proceedings were "seriously defective" or that there was reason to doubt their "quality, effectiveness, or fairness." *Yamaha*, 961 F.2d at 254. To the contrary, the Government's regard for the military commissions is so high that it previously urged this Court to dismiss or, alternatively, to hold in abeyance this habeas action pending resolution of Mr. Jawad's military prosecution. *See* Respondents' Mot. to Dismiss Habeas Petitions without Prejudice or, Alternatively, To Hold Petitions in Abeyance Pending Completion of Military Commission Proceedings at 4, 11-12, *Al-Halmandy v. Bush* (dkt. no. 160) (extolling the military commissions).

Given the exhaustive litigation on the admissibility of Mr. Jawad's post-arrest statements and the rulings by Judge Henley that they are the inadmissible byproducts of torture, this Court should hold that the Government is collaterally estopped from relying on those statements in this action.

II. Petitioner's Statements Are Inadmissible Because They Are the Result of Torture or Other Coercion.

The admissibility of a statement hinges on its being the voluntary "product of an essentially free and unconstrained choice." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). But the oppressive, often brutal, conditions under which Mr. Jawad's interrogations

have taken place—following his arrest, at Bagram, and at Guantánamo—were "so inherently coercive that [their] very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom [the Government's] full coercive force is brought to bear." *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944). While a court must normally conduct a "totality of circumstances" inquiry to determine whether a statement was voluntary, Mr. Jawad need not rely on the combined effect of state coercion. Rather, each factor—whether the threats, the beatings, the solitary confinement, the mental and psychological exploitation, or the sleep deprivation—taken alone is sufficient to support the conclusion that his statements were involuntary and therefore inadmissible.

A. Due Process, Principles of Evidentiary Reliability, and Judicial Integrity All Preclude the Use of Statements Obtained through Torture or Other Coercion.

It has long been a cornerstone of Anglo-American jurisprudence that a confession extracted through coercion cannot stand as a basis for depriving individuals of their liberty. *Ashcraft*, 322 U.S. at 155; *see also, e.g.*, *A (FC) v. Secretary of State*, [2005] UKHL 71, ¶ 51 (House of Lords; appeal taken from Eng.) (per Lord Bingham) (ruling inadmissible evidence gained by torture of witnesses by a foreign government and stating that the "common law has regarded torture and its fruits with abhorrence for over 500 years"—an abhorrence "now shared by over 140 countries which have acceded to the Torture Convention"). A "complex of values" underlies the iron-clad restriction against the use of coerced statements. *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960). In part, courts have refused to admit coerced statements to deter the governmental misconduct that occasioned them. *Elstad*, 470 U.S. at 308 (exclusion supports the "general goal of deterring improper police conduct"). Courts, however, have also refused to admit such statements for the separate reason that they are inherently unreliable. *United States v.*

Karake, 443 F. Supp. 2d 8, 50 (D.D.C. 2006) ("the goal of assuring trustworthy evidence exists independent of any deterrent effect the exclusionary rule might have under some circumstances"); *see also Jackson v. Denno*, 378 U.S. 368, 385-86 (1964); *Linkletter v. Walker*, 381 U.S. 618, 638 (1965).[12]

But wholly apart from these pragmatic considerations, courts have refused to allow the fruits of torture and other coercion to preserve the integrity of the judicial process. Indeed, the rule that "the judicial system of the United States will not permit the taint of torture in its judiciary proceedings" is without exception. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 379 (E.D. Va. 2005), *aff'd* 528 F.3d 210, 227 (4th Cir. 2008). Thus, it makes no difference whether those who carried out the torture were U.S. or foreign agents, or whether the torture happened in the United States or abroad. Even where the offending interrogation was conducted by foreign agents in a foreign country on a foreign national, U.S. courts will not admit the statement if it is the product of coercion. *See, e.g., United States v. Welch*, 455 F.2d 211, 213 (2d Cir. 1972) ("Whenever a court is asked to rule upon the admissibility of a statement made to a foreign police officer, the court must consider the totality of the circumstances to determine whether the statement was voluntary. If the court finds the statement involuntary, it must exclude [it] because of its inherent unreliability . . ."); *Brulay v. United States*, 383 F.2d 345, 349 n.5 (9th Cir. 1967) (involuntary statements inadmissible even where given to foreign officers); *Karake*, 443 F. Supp. 2d at 49-54 (excluding coerced testimony extracted by Rwandan agents). This refusal to admit coerced testimony applies doubly if, as here, the evidence was obtained through

[12] The elemental requirement of trustworthiness is fully applicable to these habeas cases. As the Supreme Court has emphasized, the Government's obligation is not merely to present "evidence," but to present "*credible* evidence" that constitutes "*meaningful* support" for the Government's position that a petitioner should be imprisoned. *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (plurality opinion) (emphasis added).

torture or other means that shock the conscience. *See, e.g., United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980) ("if the conduct of the foreign officers shocks the conscience of the American court, the fruits of their mischief will be excluded"); *United States v. Marzook*, 435 F. Supp. 2d 708, 774 (N.D. Ill. 2006) (courts will "not condone torture in any form and there is no place for statements made as a result of it in any American court" even where U.S. personnel had no role in the torture).[13]

Where a statement is made in a coercive environment, the "ultimate test" of admissibility is "the test of voluntariness." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). The voluntariness inquiry focuses on whether the accused exercised his own free will in making the statement or instead gave way to the will of his interrogators. *Id.* (courts will rely only on a confession that is "the product of an essentially free and unconstrained choice by its maker"); *Reck v. Pate*, 367 U.S. 433, 440 (1961) (suppression mandated where the facts indicate that the defendant's "will was overborne"); *Blackburn*, 361 U.S. at 208 (statements by the accused not the product of "a rational intellect and a free will"); *accord Karake*, 443 F. Supp. 2d at 50. This inquiry must consider the "totality of circumstances" including "both the characteristics of the accused and the details of the interrogation." *Schneckloth*, 412 U.S. at 226. Relevant factors include: "the youth of the accused; his lack of education or his low intelligence; the lack of any

[13] The fact that habeas is a civil proceeding has no effect on the applicability of the exclusionary rule with respect to statements obtained through torture or coercion. On the contrary, it is well-established that the exclusionary rule applies in non-criminal proceedings either where "an egregious violation that was fundamentally unfair [has] occurred" or where "the violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute." *See, e.g., Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006) (applying the exclusionary rule in immigration proceeding); *see also Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1448 (9th Cir. 1994) (recognizing that the "'imperative' of safeguarding judicial integrity, another core function of the exclusionary rule, would sometimes require application of the rule even in the civil context"). The mistreatment of Mr. Jawad plainly implicates both considerations.

advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep." *Karake,* 443 F. Supp. 2d at 15 (citing *Schneckloth,* 412 U.S. at 226).

Statements obtained through physical violence are *per se* involuntary and cannot be admitted to support or sustain a person's imprisonment. *Brown v. Mississippi,* 297 U.S. 278, 284 (1936). Physical violence:

> serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present, there is no need to weigh or measure its effects on the will of the individual victim. The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.

Stein v. New York, 346 U.S. 156, 182 (1953), *overruled on other grounds by Jackson v. Denno,* 378 U.S. 368 (1964). But "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn*, 361 U.S. at 206. Because of the overriding judicial concern that statements truly be the product of a voluntary exercise of free will, actual violence is not a prerequisite. Rather, a statement given under a "credible threat" of violence is enough to render it involuntary and therefore inadmissible. *See, e.g., Arizona v. Fulminante,* 499 U.S. 279, 287 (1991) (statement involuntary where incarcerated police informant promised the defendant "protection" from his fellow inmates if the defendant told the informant the truth about his crime); *Payne v. Arkansas,* 356 U.S. 560 (1958) (statement involuntary where officials offered protection against potential mob violence in exchange for confession).

Even coercion that falls short of violence or the threat of violence may render a statement involuntary. Coercion may come in many guises and, as the Supreme Court noted, "the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more

sophisticated modes of 'persuasion.'" *Blackburn*, 361 U.S. at 206. Hence, courts must also consider "less traditional forms of coercion, including psychological torture, as well as the conditions of confinement . . . [to] assess[] the voluntariness of the statements." *Karake*, 443 F. Supp. 2d at 51. Thus, in *Brooks v. Florida*, 389 U.S. 413 (1967), the Supreme Court deemed involuntary a confession by a defendant housed in solitary confinement for fourteen days, who "saw not one friendly face from outside the prison," and who was "completely under the control and domination of his jailers." *Id.* at 414-15. The Court also found that the defendant's constricted, barren cell and his restricted diet undermined the voluntariness of his confession. *Id.* Similarly, in *Spano v. New York*, 360 U.S. 315 (1959), the Supreme Court upheld the suppression of statements obtained after eight hours of questioning in the middle of the night by multiple interrogators in concert. *Id.* at 322-23; *see also Ashcraft*, 322 U.S. at 153 (continuous cross-examination for thirty-six hours rendered confession involuntary); *Malinski v. New York*, 324 U.S. 401 (1945) (statements involuntary where suspect stripped naked and questioned, and subsequently questioned over three days while being held incommunicado); *Chambers v. Florida*, 309 U.S. 227 (1941) (statements involuntary where given after five days of questioning in an unfamiliar and threatening setting after an all-night interrogation); *Wainright v. LaSalle*, 414 F.2d 1235, 1237-39 (5th Cir. 1969) (statements involuntary where suspect was held in "continuous incommunicado custody for 12 hours").[14]

[14] The use of Mr. Jawad's statements is also prohibited by the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987), to which the United States is a party. Article 1 of the Convention defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for *such purposes as obtaining from him or a third person information or a confession. . .*" (emphasis added). By becoming a party to this Convention, the United States obligated itself by virtue of Article 15 "to ensure that any statement which is established to have been made as result of torture shall not be invoked as evidence in any proceeding."

Any of these forms of coercion—physical violence, threat of violence, or psychological pressures (from prolonged isolation to sleep deprivation)—would alone render a statement inadmissible. Mr. Jawad, however, has been subjected to all of these forms of coercion, and subjected to them repeatedly, since his arrest in December 2002.

B. The Government Cannot Carry Its Burden to Show that Petitioner's Statements Were Voluntary and Not the Product of Torture or Other Coercion.

Where statements are alleged to have been obtained under torture or other coercion, the burden rests on the Government to prove by "at least a preponderance of the evidence" that each statement was the product of the speaker's own free and uncoerced will. *Lego v. Twomey*, 404 U.S. 477, 489 (1972). Moreover, once the accused has shown that one confession was the product of coercion, all subsequent confessions are presumptively tainted and the Government bears the burden of showing that there was a "break in the stream of events . . . sufficient to insulate the statement from the [coercive] effect of all that went before." *Clewis*, 386 U.S. at 710. *See also Karake*, 443 F. Supp. 2d at 89 (upon showing of coercion, the Government must demonstrate that sufficient time has elapsed "between the removal of the coercive circumstances and the present confession"). Given Mr. Jawad's unremitting abuse at each stage of his confinement, the Government cannot remotely meet its burden.

The starting point for the voluntariness inquiry is the characteristics of the accused. *Schneckloth*, 412 U.S. at 226. Every characteristic identified by the Supreme Court in *Schneckloth* and by this Court in *Karake*, 443 F. Supp. 2d at 15, affirms Mr. Jawad's acute vulnerability to coercion. Mr. Jawad had no formal education and was functionally illiterate. He had never encountered U.S. soldiers, much less the legal system governing his military detention. Nor, despite his ignorance of his rights, was he given any advice or access to counsel or any

other representative. But the most significant characteristic is Mr. Jawad's age. At the time of his arrest in December 2002, he was concededly a minor. From nude pictures taken of him by U.S. officials, he appeared to be between the ages of thirteen and sixteen, Doxakis Decl. ¶ 10; according to the Afghan government, Mr. Jawad was even younger, only twelve years old at the time, Letter from Afghan Attorney General, Exhibit A to Initial Traverse. The import of Mr. Jawad's youth cannot be overstated for the purposes of the voluntariness inquiry. In *Haley v. Ohio*, 332 U.S. 596 (1948), the Court upheld the suppression of the confession of a 15-year-old boy who was questioned for five hours in the middle of the night without the presence of friend, parent, or counsel, remarking that when "a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used." *Id.* at 599. As the Court explained:

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest.

Id. at 599-601. Horrendous as the treatment was in *Haley*, it pales in comparison to the abuses Mr. Jawad was forced to endure after his arrest, at Bagram, and then at Guantánamo.

Mr. Jawad need not rely on any particular factor of coercion because the instances of coercion—each independently sufficient to furnish the basis for a finding of involuntariness—are abundant and pervasive. Mr. Jawad was, in no uncertain terms, forcibly disappeared into a terrifying and utterly unfamiliar abyss of military detention. Despite his age, the authorities neither notified nor sent for his mother or any other person to safeguard his interest. Over the course of hundreds of hours of grueling interrogations, he was not permitted access to a friend, family member, or representative, nor advised of his rights. In fact, for years Mr. Jawad was not

afforded access to counsel at all.

Since his arrest, Mr. Jawad has been subject to a range of highly coercive interrogation methods and conditions, including physical and verbal abuse, stress positions, threats of violence, sleep deprivation, mental and emotional exploitation, and solitary confinement. At each stage of confinement, Mr. Jawad was grossly mistreated and held in conditions that were calculated to break his will. Following his arrest, Afghan officials subjected him to physical and psychological abuse, including threats to kill him and his family if he did not confess to the crime. After hours of interrogation, Mr. Jawad was handed over to U.S. officials. Still disoriented and terrified, Mr. Jawad was forced to pose for a series of humiliating and degrading nude photographs. He was then re-blindfolded and re-handcuffed, and taken to a makeshift interrogation room where he endured another multiple-hour session at the hands of military interrogators late into the night and into the following morning. Interrogators began by screaming at Mr. Jawad in English while he cowered in fear on the floor, where the interrogators had placed him to reinforce the shock and hopelessness of captivity. When the interrogators finally realized Mr. Jawad did not speak English and started speaking to him in Pashto, Mr. Jawad told them that he did not throw the grenade. But the U.S. interrogators, believing Mr. Jawad to be responsible for the attack based on information provided by the Afghan government, did not accept his denials and continued to batter him with aggressive interrogation methods until finally, in the early hours of the morning, Mr. Jawad confessed.

A few hours later, Mr. Jawad was taken to Bagram, arriving only days after two Afghan detainees were beaten to death—a fact that was known to all Bagram prisoners and that terrified them. At Bagram, Mr. Jawad was beaten, forced into painful stress positions, deprived of sleep, forcibly hooded, placed in physical and linguistic isolation, pushed down stairs, chained to a wall

for prolonged periods, and threatened with death.

After forty-nine days at Bagram, Mr. Jawad was flown, shackled, half-way across the world to Guantánamo, where the coercion continued unabated. From the moment he arrived, Mr. Jawad was thrust into environment designed to break him down physically and emotionally. Mr. Jawad was immediately put in 30-day isolation and permitted to speak only with interrogators. During interrogations, Mr. Jawad expressed homesickness and cried for his mother. When Mr. Jawad started showing signs of mental breakdown, the pressure was increased through the notorious BSCT program which sought to exploit his vulnerabilities and helplessness. Mr. Jawad subsequently attempted suicide. But the coercion continued. Only a few months after his suicide attempt, Mr. Jawad was subjected to a brutal sleep deprivation program—the so-called "frequent flyer" program—which was designed to "profoundly disrupt" his senses and which, according to the military judge, constituted "abusive conduct and cruel and inhuman treatment." D-008 Ruling at 4-5.

There continued to be no meaningful improvement in Mr. Jawad's day-to-day conditions of confinement. He remained confined in a cramped and barren cell, with only minimal contact with other inmates, and subject to repeated interrogation without counsel or any other representative. This maltreatment has taken a profound toll on Mr. Jawad's psychological heath. In late 2008, a court-approved psychologist determined that Mr. Jawad suffers from PTSD as a result of "the torture, cruelty, and abuse he suffered while in detention." Porterfield Decl. at 4.

In short, at no point has there been a respite in the profoundly coercive conditions of Mr. Jawad's confinement that would "break the causal chain" between his initial torture by Afghan officials and his subsequent confessions in U.S. custody (themselves also a product of torture and abuse) such that the latter are "sufficiently an act of free will to purge the primary taint." *Elstad*,

470 U.S. at 306 (quoting *Taylor v. Alabama*, 457 U.S. 687, 690 (1982)). Independently of that initial taint, because of the horrendous abuse visited on Mr. Jawad during each stage of his detention, there is no point in time in which he has been held in a manner that would permit this Court to conclude that his statements were "made freely, voluntarily, and without compulsion or inducement of any sort." *Haynes v. Washington*, 373 U.S. 503, 513 (1963). Those statements cannot provide a basis for his detention—now well into its seventh year—and must be excluded.

CONCLUSION

For the foregoing reasons, the Court should grant the motion to suppress all of Mr. Jawad's statements made to Afghan and U.S. officials.

Respectfully submitted,

_/s/ Jonathan Hafetz_____

Jonathan Hafetz (admitted *pro hac vice*)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 284-7321
Fax: (212) 549-2583
jhafetz@aclu.org

Major David J.R. Frakt (admitted *pro hac vice*)
Office of Military Commissions
Office of the Chief Defense Counsel
Franklin Court Building, Suite 2000D
1099 14th Street, N.W., Suite 119
Washington, D.C. 20005
Phone: (202) 761-0133, ext. 106
Fax: (202) 761-0510
dfrakt@wsulaw.edu

_/s/ Arthur B. Spitzer_____

Arthur B. Spitzer (D.C. Bar No. 235960)
American Civil Liberties Union
of the National Capital Area
1400 20th Street, N.W., Suite 119
Washington, D.C. 20036
Phone: (202) 457-0800
Fax: (202) 452-1868
artspitzer@aol.com

Counsel for Petitioner Mohammed Jawad

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